

## **U Mass Online Course:**

### **Online Dispute Resolution (Legal Studies 3843)**

Q&A Thread from 3/8/04 through 3/12/04

[Questions from class members in *italics*.]

#### Opening Posting from Daniel Rainey

Ethan Katsh has asked that I open a discussion with some background information on me and the agency, so here goes – please recognize that I can't adequately cover the complexity of what we do in a few paragraphs, so feel free to ask clarifying questions.

First the agency - the National Mediation Board (NMB) is the Federal agency that handles labor management disputes in the airline and railroad industries in the U.S. We operate under a very specialized labor law, the Railway Labor Act. If you want to get more detailed information than I stuff into this note, and if you want to see the Act itself, you can go to the agency's web site, [www.nmb.gov](http://www.nmb.gov), for more than you ever wanted to know.

In the realm of dispute resolution, we have four mission areas. Our legal department conducts elections and makes decisions that determine which unions, if any, are chosen by workers to represent them.

Our Arbitration department uses contract arbitrators to settle disputes arising out of contracts that have been negotiated and are in place.

Our Mediation department offers grievance mediation services to parties with disputes over existing contracts (before they go to arbitration), and they offer collective bargaining mediation to parties negotiating new contracts or renewal contracts. Contract mediation for our parties is not universally mandated, but it is mandated by the law before parties can "change the status quo" - strike or replace workers, etc.

We also offer alternative dispute resolution services, which are voluntary and cover both grievances under existing contracts and the negotiation of full contracts. Our use of online dispute resolution is in conjunction with our ADR program.

Starting last year we made an investment in hardware and software that allows us to use a closed, peer-to-peer network of computers for brainstorming, ranking, etc., with groups conducting face to face meetings. We have begun to use this system in our ADR training, which precedes any

facilitation or mediation, and we have two parties who have now requested the use of this capability, and the remote, web-accessible version, to help with their contract negotiations and with drafting of agreements.

I am one of two Deputy Chiefs of Staff at the NMB - the ADR and ODR programs report to me, and I am directly involved in the design and delivery of training and facilitation/mediation services in both industries. Before coming to the NMB I was a private consultant, an executive with a consulting firm, and a faculty member at George Mason University in Fairfax, Virginia. I have been involved in dispute resolution issues for many years, and am still involved in some international and workplace ADR projects outside the NMB.

### Question 1 & Response

*Hello Mr. Rainey, thanks from Ethan and I here at the Center for taking the time to work with our students this week. I have a two part question: first, what is the NMB currently doing with ODR technologies and practices (i.e. how are you leveraging information technology in your day to day practices) AND where do you envision ODR being applied in the future (i.e. what sorts of cases?). I guess as a follow up, what do you see as the major challenges to these hoped for applications? Thanks!*

I'm delighted to be involved. Here's a go at your questions.

Currently we are in the process of introducing the idea of ODR to the parties in the industries we serve. I have done a series of "demo" presentations that involve taking some triggering questions that our groups can have some fun with and walking them through some brainstorming and rating/ranking work. My goal with these demo presentations is to leave them with the notion that the technology can quickly help them do some things they would be doing anyway, but with less efficiency, and to leave a good taste in their mouths about the technology - it can be fun to use, and it is not daunting or difficult to use. Past the demos, we have integrated a basic unit on ODR into the interest based bargaining training and grievance mediation training that we do. This training is mandatory for parties who want us to facilitate IBB negotiations or interest based grievance mediation. The training component again aims to show in a low risk environment that the technology can bring efficiency to the option generation process, and is easy for the participants to use. One railroad union has indicated that they would like to use ODR for their grievance mediation cases, and we will probably start with them sometime this summer. I think they will use the system for agenda setting, issue identification, and agreement writing asynchronously, and for option generation synchronously. On the airline side, I have just begun our first contract negotiation case using ODR. There again, I think they will find it most useful for agenda setting and information exchange up front, option generation during bargaining, and for joint writing committees after tentative agreements have been reached. Finally, we are partners with U Mass on an NSF grant proposal that would, if funded, help study the impact of ODR on

mediation, and generate the "next generation" of ODR tools, using our client base as the research subject pool.

In the future I hope to introduce the basic uses of ODR that I outlined above to a wide range of our parties, and to move them into more sophisticated uses of the technology - constituent polling, etc. It is clear to me that much of the time consuming work currently done in bargaining can be greatly improved and done away from the table using ODR, leaving the time "at the table" for the discussions that require face-to-face interaction.

I see four basic challenges.

First, cost - the cost of the software and the cost of hosting can be a problem. We are bearing the cost of the software license and the hosting, but as more and more groups become interested and use the system our costs will rise - at some point we will not be able to increase capacity. I hope the NSF grant comes through, because one outcome of that will be to offer some open source software to the bargaining community, thereby helping with the cost issue.

Second, complexity - FacCom, the software we are using, is pretty much the state of the art for the kind of dispute resolution we do, and while it is not difficult to become a reasonably good basic, and I stress basic, user, it is difficult to become an advanced user. In some ways and for some applications I think the technology is overly complex, hitting a very small nail with a very big hammer. This is a problem for the users, but it is also a problem for the facilitators who help the users.

Third, facilitator prep - while we have not gotten any real pushback from our mediators, there is a very steep learning curve involved in beginning to use ODR. There is the problem of learning the ODR software, as I noted above, but there is also the necessity to integrate different or adapted methods into the facilitation itself. Running a bargaining session with ODR is a bit different from running one without ODR.

Fourth, party buy-in - this is the least of our worries, I think. Parties may be reluctant to trust their information on servers that could be, accidentally or on purpose, invaded by others, and they may have some of the aversion to technology that is found in the population at large, but with one or two "successes" to tout, I think we will find that the parties ask for more ODR help than we can give them.

I hope this addresses your questions - if not, let me know and I'll give it another shot.

## Question 2 & Response

*Could you tell us more about the ADR training component and how you introduced the concept of ODR? You mentioned the "demo" - was that introduced on-line, f2f, or both? I think it is impressive you have such buy-in given the newness of the system. Were there other things you did to create that receptiveness?*

*Finally, could you say more about the interface of ODR and union constituents? You mention constituent polling. Is there a sense within the unions that ODR would also provide a greater scope of information, in a more efficient way, and enable speedier more comprehensive feedback to and from their members? I may be off track here as I am not familiar with the industries but it would seem to be a powerful opportunity and may in the future even lead to different dynamics around decision making within the unions?*

*Thank you for your time with us this week.*

All the demos we have done with our parties have been face to face - early on in our internal discussions about ODR we did participate in a synchronous session that was run via the web with a facilitator running the meeting via a phone hook-up, but all of our work with the parties has been up close and personal.

The training component on ODR has been adapted from something we did with the groups anyway - we're just using ODR to demonstrate how it can integrate into the process. We use an interest based bargaining (IBB) model that includes a brainstorming options phase and a rating/ranking phase. Our training has always included an extended exercise in which we take a realistic scenario and run it through the entire IBB process, asking the parties to assume the roles of union and management in the scenario. Now we are doing a short intro explanation of ODR, and then using our networked computers to allow the parties to brainstorm and rate the options. Basically what we've done is take a process familiar to them and with which they are comfortable and layered on top of it an appropriate use of ODR technology. It seems to be working very well both as a training tool and as a way to intrigue them about the further use of ODR.

At least one of the unions, the IAMAW, is already using ODR technology as it works with management on sites around the country. They do not use it internally for polling, etc. We have chosen not to push the polling aspect and the other information distribution and gathering aspects at this point, partially because most of the unions already do some of this in other ways and we don't want to muddy the waters of an ODR discussion with their current processes. However, we do use the ODR technology to conduct our

customer service surveys after training, and I expect that as we move along the parties will be interested in expanded uses.

### Question 3 & Response

*My interest in the buy-in stems from my work prior to becoming a mediator. I worked for 15 years as a consultant in the design and implementation of employee assistance programs, including an IBEW local. As long as the union was involved from the ground floor with management in the design, policy, and procedures for the program we had a great deal of support. Without early collaboration there would have been more suspicion and noncommitment. Can you say a word or two about any union/management involvement there is in the design of the ODR component you are working with as well as how much latitude you have in involving the parties who will be using the ODR ADR component?*

Our ADR program is a voluntary program, and as a part of the ADR program our ODR work is also voluntary. Both labor and management have to agree to use ODR in the first place, and then agree regarding how to use it (synchronous, asynchronous, etc.). I'm working right now with a union and carrier to set some expectations about how to use ODR in their negotiations. We decided internally to make ODR a part of our mediators repertoire, but our roll out to the parties has included questions for them about how they think we should apply it. Ultimately, it is the parties who will control the use and extent of our ODR work. If they want it and want to work with us to set parameters, we'll use it. If they don't want to use it, we won't force it on them. This is why we are going so carefully in the beginning - we don't want to do anything precipitous that would cause a "disaster" in the eyes of the parties, thereby turning them off the entire notion of ODR.

### Question 4 & Response

*I'm interested in your comment about party "buy-in"; there are privacy issues obviously, though my sense from your comment is that there is comfort in how many people may become part of the system, and that there will be a foundation for trusting that the servers won't be hacked.*

*What about trusting that the process itself will lead to a consensus better, faster and cheaper than face to face negotiations? Is there any training available for participants in the process, in addition to the training of the ODR mediators, about the technology and the mediation process?*

First of all, let me be clear that we are not recommending bargaining that cuts out the face to face component. Rather, we are suggesting that the parties consider ODR technology to augment portions of the bargaining process. They seem to see pretty quickly that targeted use of ODR is going to offer some efficiency, so we really haven't had to do any selling of that idea. In the long run you have put your finger on the major issue - privacy and security of information. Eventually they may be sharing information that is proprietary or sensitive, and it would be very damaging to them and to our ODR program if that information got into the wrong hands. Even during brainstorming they tend to throw up options that don't make it into the final agreement, and to which they would not like to be held. Ultimately we have to make sure we have a system that holds this information securely - this is one of those cases, I think, in which performance over time is the only real way to generate trust.

*Thanks for your comments.*

*My sense is that like anything, performance is based in part on preparation. And, moving a process from face to face to online, is going to vary across groups, and may also depend on the types of issues which are on the table.*

*Training people in how to trust each other, and how to trust and use the technology, in advance of any dispute resolution process, provides some promise that the parties will be prepared to use an ODR process when the need arises. This is something I've been working on with a client of mine (I'm a lawyer doing IP work for online businesses and education providers) for a couple of years. They are currently working with the Office of the Comptroller of the Currency to build trust online. It's fascinating.*

*Anyway, I applaud your use of the technology and your willingness to take risks in support of your mission. Congratulations.*